

“Management Action” and “Reasonable Management Action”

Presented by Mr Andrew McLean Williams

I am grateful for the advice and comments of Mr Adam Johnson of Counsel, and Mr Darren Taylor from Q-COMP on an earlier draft of this paper. All the opinions expressed herein are my own and do not reflect the views of Q-COMP.

Preliminary

[1] This seminar will be confined to an analysis and discussion of just one subsection of the *Workers' Compensation and Rehabilitation Act 2003* ('the Act'), that being subsection 32(5). Subsection 32(5) contains the *Reasonable Management Action* ('RMA') exception to the definition of injury, used for purposes of access to the worker's compensation scheme in Queensland.

[2] Very often, in RMA cases, it is beyond dispute that the worker has sustained what would otherwise be an injury as defined by either section 32(1) or 32(3) of the Act¹. However, the ancillary question – whether the claimant's psychological or psychiatric injury is nonetheless removed from an entitlement to compensation because it arises out of, or in the course of, 'reasonable management action' – is often a very hotly contested issue. The frequency and ferocity over which this terrain is campaigned is what makes RMA a fitting topic for further examination.

[3] Section 32(5) of the Act provides: .../

- (5) Despite subsection (1) and (3), injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
 - (b) the worker's expectation or perception of reasonable management action being taken against the worker;
 - (c) action by the Authority or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way:

- *action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker*
- *a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment*

This Presentation – Speakers' Demarcation:

[4] My presentation will “bookend” that of Mr Gary O'Grady, of counsel. The topics covered by me initially will be:

- The scheme of the Act, the purpose of s.32(5), its recent legislative history, and some analysis of the expression “arising out of, or in the course of” at least insofar as it is used in the context of RMA.
- What is management action?
- What then comprises *reasonable* management action?

¹ In other words the worker has sustained either a psychological or psychiatric condition at work, or a pre-existing condition of that type has been aggravated by events at work.

[5] Gary O’Grady will then pick up from where I have left off and will look at:

- What it means when section 32(5)(a) speaks of ‘reasonable management action *taken in a reasonable way*, by the employer, in connection with the worker’s employment’.
- The section 32(5)(b) exclusion, that of the worker’s own expectations or perceptions of reasonable management action being taken against the worker.
- (albeit very briefly), psychological or psychiatric injuries excluded by reason that they have arisen as the result of Action by the Authority or an insurer in connection with the worker’s application for compensation.
- Some practical evidential issues.

[6] Finally, I will speak again, and will attempt to cover the implications arising out of two recent Industrial Court cases on the meaning of s.32(5), being *Q-COMP v Education Queensland* (“the McArthur decision”) and *Prizeman v Q-COMP*. As part of that discussion, I will also analyse the apparent tension between these two decisions, on the one hand, and that of an earlier authority, *Delaney v Q-COMP*. In the process, I will attempt to reconcile these apparently conflicting streams of authority.

Scheme of the Act and purpose of s.32(5)

[7] Relevantly, and in very broad compass, the Act provides that a “worker”² who has sustained an “injury”³ is eligible to make application for “compensation”⁴, which includes income support benefits (see generally Chapter 3 of the Act); and access to rehabilitation services (per Chapter 4 of the Act). Injured workers who have managed to work their way through the requirements of chapters 3 & 4 of the Act and who have got themselves as far as Chapter 5 may also have an entitlement to common law “damages”⁵.

[8] Who can qualify as a “worker” under section 11 of the Act has been discussed in previous seminars in this series.⁶ So too, earlier seminars have dissected subsections 32(1) and 32(3), and what it is that comprises a personal injury “arising out of, or in the course of, employment”, if the employment is “a significant contributing factor” to that injury.⁷

[9] Importantly - particularly in terms of understanding the tenacity with which these RMA claims can be contested - it needs to be borne in mind that section 32 is the pivot, around which the entire scheme for workers’ compensation in Queensland revolves. Initially, it is the injured worker who bears the onus to prove that their case is one that is capable of acceptance.⁸ Not only must the worker prove that they have sustained an injury - as defined in either s.32(1) or s.32(3) - but they must further show that s.32(5) does not act to remove their entitlement to benefits from the scheme for compensation. As was said by President Hall in *Ivey v WorkCover Queensland*⁹.

On a fair reading of s.34 [of the 1996 Act] it does not impose a general liability to which s.4(4) “provide[s] for some special grounds of excuse, justification or exculpation depending on new or additional acts”. Section 34 states “the complete factual situation which must be found to exist before any one obtains a right under the provision.” Compare *Vines v Djordjevich* (1955) 91 CLR 512 at 519.

[10] In simple terms, all of the benefits and prospective future entitlements described in paragraph [7] will not be available to those who have a psychological or psychiatric injury, if that injury also happens to be one that is caught by s.32(5). As such, Section 32 of the Act should be read as a “cascading” provision. In the event that any particular injury qualifies as a personal injury under the (rather inclusive and beneficial) terms of either subsections 32(1) or 32(3); analysis must “cascade” down to subsection 32(5) - in order to see whether what would otherwise comprise a injury eligible for compensation is nonetheless rendered ineligible for compensation (and any downstream access to common law damages), by reason of s.32(5).

² see s. 11

³ see s.32

⁴ see s. 9

⁵ see s. 10

⁶ See the *Q-COMP Seminar Papers on this topic* by each of Mr Peter Rashleigh of counsel, Mr Peter Major of counsel, and Mr Peter O’Neil of counsel.

⁷ See the *Q-COMP Seminar Papers on this topic* by each of Mr Frank Lippett of counsel, Mr Stuart Sapsford of counsel, and Mr Gary Long of counsel.

⁸ Once an appeal has been launched, the position changes somewhat. Then, the Respondent bears a jurisdictional onus, and it is the Appellant - who asserts reasonableness or unreasonableness - who must prove it.

⁹ *Ibid.*

[11] Although the legislation has been categorised as beneficial legislation,¹⁰ s.32(5) (and its predecessor s.34(4)) is an exclusionary provision.¹¹ As such, it is not to be construed in such fashion as will maximise the benefits that might flow to a claimant worker under either of s.32(1) or s.32(3). As was said by Burchett J in *Commonwealth v Human Rights and Equal Opportunity Commission and Another* (1998) 152 ALR 182 at 189

Where remedial legislation contains exemptions designed to strike a careful and practical balance between competing community interests, a court which distorts that balance in the name of furthering the remedy risks serving a political role, and in doing so, frustrating the will of the parliament.

[12] In this light, if s.32 were to be viewed as the entrance to a harbour, then s.32(5) is the equivalent of a boom-net across the mouth of that harbour, designed to keep certain vessels (aka RMA claims) from entering safe anchorage.

Legislative History of s.32(5)

[13] Before proceeding with any practical analysis of s.32(5) it is useful to trace the legislative aetiology of this provision. Where we are 'at now' is often better understood by knowing where it is that we have 'come from'.

[14] As mentioned in paragraphs [9] - [12], s.32(5) is not beneficial to workers. It is exclusionary, and has the public policy intent of excluding a specific type of claim from the compensation scheme. To properly understand that intent, one need only trace the recent legislative history of this provision, and need only go back as far as 1996.

[15] As may be recalled, in 1996, and in light of the findings of the Kennedy Report,¹² the Queensland worker's compensation scheme was on the edge of a financial precipice. Substantial reform was recommended, and many aspects of the scheme were subsequently amended. As a result, clause 34 was introduced. It was explained in the WorkCover Queensland Bill 1999 as having the following rationale:

Clause 34 replaces section 6 of the Workers' Compensation Act 1990. It explains the meaning of "injury"
.../

...The exclusion criteria from the definition of injury in section 6(3) for psychiatric or psychological conditions have been strengthened in response to an increasing number of claims where remedial action regarding a workers' poor performance (one example of reasonable management action) was the stimulus for the claim.

Amendments to the definition of injury were introduced in January 1996 in an attempt to control this trend. However, under these amendments, employers have still been held responsible for claims where reasonable management action had been taken. This is considered inappropriate, especially when a worker may have a pre-existing disposition to psychiatric or psychological disorder.

This clause now requires regard to be had, when making a decision about the reasonableness of the management action, about how a worker of ordinary susceptibility would have reacted. A 'reasonable person' test has also been introduced so that consideration must be given to whether a reasonable person in the same employment would have been expected to sustain the psychiatric or psychological disorder.

This clause also excludes psychiatric or psychological injuries that result from action being taken by WorkCover, or a self-insurer, in relation to the management of a workers' compensation claim including rejection of the claim or cessation of an entitlement.

¹⁰ *State of Queensland v Q-COMP and Beverley Coyne* [2003] 172 QGIG 1447 at 1448; *Q-COMP v Education Queensland* ('the McArthur decision') [2005] QIC 46. It is perhaps noteworthy that, to the extent that the Act throws up a series of mandatory hurdles that must be overcome in order to access common law damages, the legislation has been found to be plainly non beneficial (see: *Kelly v WorkCover Queensland* [2002] 1 QdR 496 at 498, per Atkinson J). Common law damages afford a different context to that of statutory compensation entitlements.

¹¹ *Q-COMP v Education Queensland* [2005] QIC 46; 179 QGIG 491; *Prizeman v Q-COMP* [2005] QIC 53; 180 QGIG 481.

¹² *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*.

[16] A few years later, and once a number of practical difficulties had been identified in the day-to-day administration of the *WorkCover Queensland Act 1996*; various further amendments were introduced, via the *WorkCover Queensland Amendment Bill 1999*. These amendments came into effect as law, on 1 July 1999.

[17] Although expressed in somewhat muted terms, it is still clear from a reading of the *WorkCover Queensland Amendment Bill 1999* that the pre 1 July 1999 version of s.34 was considered too restrictive. As was said in the Explanatory Memoranda at the time of the introduction of the 1999 Amendments

The objects of this Bill are aimed at ensuring that the Queensland worker's compensation system is fair and balances the rights of injured workers against the need for competitive and affordable premiums for employers....

The definition of injury and the definition of worker introduced under the *WorkCover Queensland Act 1996* placed increased restrictions on workers' access to the workers' compensation system. These restrictions are proving to be detrimental to the livelihood of many workers and their families....

The current Queensland definition of injury as "the major significant factor" is the most restrictive in Australia....

...[T]he tests for a "reasonable person" and "ordinary susceptibility" in subsections 34(4)(d) and 34(5) have been removed, as these were difficult to interpret and apply. These tests related to psychological and psychiatric injury (stress claims).

[18] The 1996 Act has since been entirely repealed only to be replaced by the current (2003) Act. Despite that, there are no substantive changes between the post 1 July 1999 version of s.34 in the 1996 Act, and the current s.32.

[19] Each of the subsections 32(1), 32(2), and 32(3) are in identical terms to subsections 34(1), 34(2) and 34(3) of the former Act. Subsection 32(4) of the current Act contains a trifling semantic variation from subsection 34(4) of the 1996 Act.¹³ Meanwhile, subsection 32(5) is in identical terms, save for making references to "the Authority"¹⁴ and "an insurer" in lieu of "WorkCover" and "self-insurer", which were the equivalent terms, under the former legislation.

[20] Clearly therefore, s.32(5) is effectively the same provision as the immediately former s.34(5). It is for this reason that those cases decided by the Industrial Court in relation to the former s.34(5) still serve as authority with respect interpretation of s.32(5) of the current Act. Therefore, it may be concluded that the purpose and intent of s.32(5) has not altered, in any material way, since 1 July 1999. Despite the shift to the new Act, the Parliament has seen fit to retain this provision, which is still aimed at the extirpation of a particular type of claim¹⁵.

[21] Perhaps the simplest means by which to comprehend the evolution in the definition of injury in the legislation between the commencement of s.34 on 1 February 1997, and the current point in time is to simply observe the differences between section 34 and section 32 via a juxtaposition of the old and new text.

[22] Immediately below, I have set out the full text of s.34 as originally enacted in the 1996 Act. Those portions of the original provision that have since been repealed and are then indicated by them having been ~~struck through~~. Meanwhile, newer parts of the provision, introduced in either 1999 or by the 2003 enactment (other than the change in section number from '34' to '32') have been indicated by them having been underlined.

¹³ Section 34(4) of the 1996 Act provides "to remove doubt", whereas s. 32(4) of the current Act specifies "to remove any doubt".

¹⁴ The Authority is Q-COMP, which was established by s.326 of the Act.

¹⁵ "Prima facie the legislature intended the same construction, having re-enacted the words in cognate legislation with presumed knowledge of that interpretation": *Scagliotti v Boyd* [1962] QdR 481; *Johns v Johns* [1988] 1 QdR 138 at 141 – 142.

Meaning of “injury”

34.(1) An “**injury**” is personal injury arising out of, or in the course of, employment if the employment is the major a significant factor causing the injury.

(2) However, employment need not be the major a significant contributing factor causing the injury if section 36(2) or 37(2) applies.

(3) “**Injury**” includes the following –

- a) a disease contracted in the course of employment, whether at or away from the place of employment, if the employment is the major a significant contributing factor causing the disease;
- b) ~~an aggravation of a disease if the employment is the major significant contributing factor causing the aggravation;~~
- b) an aggravation of the following, if the aggravation arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation-

(i) a personal injury;

(ii) a disease;

(iii) a medical condition if the condition becomes a personal injury or disease because of the aggravation.

(c) loss of hearing resulting in industrial deafness if the employment is the major a significant contributing factor causing the loss of hearing;

(d) death from injury arising out of, or in the course of, employment if the employment is the major a significant contributing factor causing the injury;

(e) death from a disease mentioned in paragraph (a), or ~~an aggravation of a disease mentioned in paragraph (b), if the employment is the major a significant contributing factor causing the disease or aggravation to the disease;~~

(f) death from an aggravation mentioned in paragraph (b), if the employment is a significant contributing factor to the aggravation.

(4) “**Injury**” does not include a personal injury, disease or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

(4) For subsection 3(b), to remove any doubt, it is declared that an aggravation mentioned in the provision is an injury only to the extent of the effects of the aggravation.

(5) Despite subsection (1) and (3), **injury** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances -

- a) reasonable management action taken in a reasonable way by the employer in connection with the worker’s employment;
- b) the worker’s expectation or perception of reasonable management action being taken against the worker;
- c) action by WorkCover the Authority or a self-insurer an insurer in connection with the worker’s application for compensation;
- d) ~~circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.~~

Examples of actions that may be reasonable management actions taken in a reasonable way –

- Action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- A decision not to award or provide promotion, reclassification or transfer of, or leave or absence or benefit in connection with, the worker's employment.

(5) For subsection (4), in deciding in a particular case whether management action was reasonable or whether management action was taken in a reasonable way –

a) regard must be had to what action or way of taking action would have been reasonable for a worker of ordinary susceptibility to psychiatric or psychological disorder; and

b) regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.

[23] As well as visibly demonstrating the shifts in the definition of injury over the past decade, the juxtaposition of the old and new text of the provision (paragraph [22], above) has the further benefit of demonstrating those aspects of the provision that have not changed, over time.

[24] With respect subsection 32(5), the constant (immutable?) aspects of the subsection warrant further consideration. These are the real keystones in the structure of the provision. Their role needs to be understood, in order to properly conceive and then apply the provision, in practice.

[25] The 'keystone' expressions in s.32(5) are:

- The expression "arising out of, or in the course of", as appears in the preliminary words of s.32(5);
- The concept "reasonable management action" as used in s.32(5)(a), s.32(5)(b);
- The further expression "reasonable management action taken in a reasonable way", as used in s.32(5)(a); and
- The word "despite" at the commencement of s.32(5).¹⁶

What is meant by "arising out of"?

[26] The meaning of this expression has already been examined in detail in a very comprehensive paper prepared by Mr Gary Long of counsel, as was presented by Mr Adam Johnson of counsel, in a previous seminar in this series.

[27] Because of the availability of that paper, I will not descend into the same degree of detail with respect my analysis of this expression. However, some analysis is still warranted here.

[28] It is to be particularly noted that this expression is used in a number of places throughout s.32. The same meaning is to be given to it on each occasion in which it is used, with any necessary adjustment, to account for shift in locality.

[29] The cases that are habitually raised¹⁷ as authority for the meaning of this expression are *Lackey v WorkCover Queensland*¹⁸; *Avis v WorkCover Queensland*¹⁹, and *WorkCover Queensland v Curragh Mining Pty Ltd*²⁰. These cases stand as authority for the notion that the expression is not one in which it is to be regarded as a synonym for "caused by", yet that there is still a causal dimension in the expression, requiring at least some minimally causal nexus between employment and the injury.

¹⁶ I acknowledge that this term was not used prior to 1 July 1999. Consider it a "new" keystone, the role of which will be discussed further, below.

¹⁷ Oftentimes referred to as "the trilogy". Biblical allusions are often hoped by advocates to have a persuasive effect on judicial officers.

¹⁸ [2000] QJC 43; 165 QGIG 22. This was a case involving a physical injury, which later caused the injured worker an anxiety condition.

¹⁹ [2000] QJC 67; 165 QGIG 788

²⁰ No C89 of 2002.

[30] In *Lackey*, President Hall noted that in both Australia and the United Kingdom the early legislation in the realm of workers' compensation had originally required that an injury "arise out of *and* in the course of" employment, yet that, over time, this requirement changed - via the substitution of "or" in lieu of "and" - such that there was not thereafter the simultaneous need for a causal and temporal nexus between the injury and employment. Yet, at the same time, President Hall stated

I accept Mr Newton's submission that the test posited by the words "arising out of" is wider than that posited by the words "caused by" and that the former phrase, although it involves some causal or consequential relationship between the employment and the injury, does not require the direct or proximate relationship which would be necessary if the phrase used were "caused by"

[31] In *Avis v WorkCover Queensland*, the appellant was a high school teacher who ceased work on 12 August 1997, suffering from a major depressive illness. The evidence was that the appellant's condition was as the result of his having suffered a substantial blow to his self-confidence, due to the ill-discipline of students after the introduction of a new student 'behavior management' policy; and his perception that he had lost any ability to exert any authority over the student body. (It goes without saying that the appellant was never a proponent of the new policy, and was further critical of its implementation).

[32] In *Avis*, the appellant's initial *Application for Compensation* was rejected, as was his subsequent *Application for Review*. An appeal was then launched in the Industrial Magistrates Court: and that too was unsuccessful. The Industrial Magistrate found that the implementation of the new behaviour management plan was an instance of 'reasonable management action'. In giving his decision, the Industrial Magistrate expressly found that

...It is the applicant's case that the student discipline problems which **caused** his sense of helplessness and inadequacy and his distress over his ineffectiveness as a teacher arose because of ineffectiveness of the behavioural management plan and its administration. The causative link connecting the cause of the applicant's illness to management action appears to be direct and irrefutable on the applicant's own case. The applicant's case is that the stresses that caused his illness were brought about by the ill discipline of students. The ill discipline of students was facilitated by the behavioural management plan and/or the way in which it was administered.

In my view, to give the provisions of paragraph 34(4)(a) their ordinary meaning and apply them to the circumstances of this case the applicant's illness arose out of **and** in the course of the adoption of the behavioural management plan. I have found the adoption and implementation of that plan to be reasonable management action. That being the case the applicant's illness is excluded from the definition of 'injury' by the provisions of paragraph 34(4)(a).

[the **emphasis** is not in the original, and has been included, by me]

[33] An appeal against that decision was then commenced in the Industrial Court. Some impetus was given to that appeal by an infelicitous use of words²¹ in the judgment at first instance. During the appeal, it was argued that s.34(4)(a)²² should only apply where it is management action *itself* which has triggered the psychiatric or psychological disorder. The appellant's contention was that his injury had not been caused by the 'management action' - comprised by the formulation and implementation of the new behaviour management plan - so much as it had been caused by the unruly student behaviour - somewhat downstream from that - which factor had caused the appellant to realise that he could not do his job, and thus decompensate.

²¹ Which words I have highlighted in bold, in the passage excerpted, at paragraph [33].

²² what is now s.32(5)(a)

[34] That argument was however expressly rejected by President Hall, who, in adhering to his own previous decision in *Lackey v Workcover Queensland*²³, said

It was His Worship's use of the "causal link" which has been the subject of the attack on the appeal. The submission is that s. 34(4)(a) will attach only where the management action in itself triggers the psychiatric or psychological disorder. The contention is that in this case the taking and implementation of the management action did not trigger the illness. It is contended that in the wake of the management decision and its implementation a set of circumstances arose in which the appellant could not do his job with a consequential loss of confidence and a feeling of inadequacy, helplessness and ineffectiveness. Reliance is placed on the decision of Davies AJA in *Manly Pacific International Hotel v Doyle* [1999] NSW CA 465 upon a provision on a similar subject matter in the *Workers' Compensation Act 1987* (NSW).

I am unable to accept the submission. The New South Wales provision related to circumstances in which an injury was "caused by" reasonable action (of defined type). Section 34(4)(a) of the *WorkCover Queensland Act 1996* is directed at an illness which "arises out of" reasonable management action taken in a reasonable way. I adhere to the view which I expressed in *Lackey v WorkCover Queensland* (2000) 165 QGIG 22 at 22 (admittedly on another limb of s.34), that the test posited by the words "arising out of" is wider than that posited by the words "caused by" and that the phrase "arising out of" whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship [as] would be necessary if the phrase used were "caused by".....

...On the facts there was plainly a sufficient causal nexus to satisfy the test "arising out of". In those circumstances it is unnecessary to deal with the correct application of the test "in the course of" reasonable management action taken in a reasonable way. It is sufficient to observe that *prima facie* His Worship was wrong to substitute "and" for "or".

"Arising in the course of..."

[35] Again, this topic and the case authorities that give meaning to the expression "in the course of" have been dealt with in significant detail in Gary Long's earlier paper. The authorities that are here usually incanted are *Weston v The Great Boulder Gold Mines Ltd*²⁴; *Kavanagh v The Commonwealth*²⁵; *Hatzimanolis v ANI Corporation Ltd*,²⁶ *Gregory v Comcare*,²⁷ and *WorkCover Queensland v BHP (Qld) Workers' Compensation Unit*²⁸. Regard should also be had to the more recent case of *Roncevich v Repatriation Commission*²⁹.

[36] I do not propose to re-dissect all of those cases – Gary Long has done that already. However, a quick "snapshot" of where those authorities place the meaning of the expression "arising in the course of [the worker's employment]" would appear to be as follows:

- Due to the use of "in the" the expression connotes a more temporal relationship than does the expression "arising out of...".
- However, the expression means more than simply "arising whilst at work" or "during the period of" employment.
- Significantly, a mere temporal relationship is not enough – there must be some further connection with either work or the 'natural incidents' of employment. These can include periods away from the place or task of employment; even to engagement in what might superficially appear as domestic tasks - or even to recreational pursuits - on the proviso that some aspect of employment affords an explanation for why it is that the worker was engaged in these tasks when injured.

²³ *Supra*.

²⁴ (1964) 112 CLR 30.

²⁵ (1960) 103 CLR 547

²⁶ (1992) 173 CLR 473

²⁷ (1997) 72 FCR 196

²⁸ [2002] QJC 27

²⁹ (2005) 79 ALJR 1366.

How do these expressions operate specifically within the context of s.32(5)?

[37] What then is the specific relevance of the foregoing analysis to s.32(5)?

[38] The fact that the expression “arising out of, or in the course of” is also used in s.32(1) means that the same analysis used for understanding the meaning of that expression in s.32(1) needs to be applied in respect of each of the matters identified in subsections 32(5)(a), (b) and (c) - with appropriate modification to account for the shift in context from the general (‘employment’) to these more specific contexts.³⁰ Now, rather than simply “arising out of or in the course of employment” the contexts become, variously:

- a) *arising out of or in the course of* reasonable management action taken in a reasonable way by the employer in connection with the worker’s employment; or
- b) *arising out of or in the course of* the worker’s expectation or perception of reasonable management action being taken against the worker; or
- c) *arising out of or in the course of* action by the Authority or an insurer in connection with the worker’s application for compensation.

[39] To my way of thinking, an application of the law on these two expressions – that which has just been (briefly) traversed in paragraphs [27] – [37] of this paper results in the following interpretive guides:

- If a worker’s psychological or psychiatric condition is directly caused by any of the items in s.32(5), then it is obviously excluded from the definition of injury. This should be a simple question of evidence.
- Even if not specifically “caused by” any elements of s.32(5) a worker’s psychiatric or psychological injury may still be one arising out of, or in the course of s.32(5) matters, *if* there is some consequential nexus between the condition and the matters specified in sections 32(5)(a) – 32(5)(c), inclusive.
- The nexus needs to be more than simply temporal.
- Although needing to be more than temporal, the additional nexus need not be “significant”. Some indirect or even collateral nexus may suffice.
- On the facts of *Avis*, the “downstream consequences” of reasonable management action that have resulted in a psychiatric or psychological injury can still have sufficient causal nexus with RMA for that injury to be excluded from the compensation regime by s.32(5).

But where are the outer limits?

[40] Are all things that happen in the workplace thereby capable of being construed as artefacts of management action, needing only to be demonstrated to have been reasonable? Some proponents of managerialism would probably feel very comfortable in arguing that everything that happens in the work environment is the consequence of management action. However, that view is one that is borne out of ideology, and it is not one that accords with the conventional legal approach.

[41] The legal approach – that which is reflected in the decisions of the Industrial Court - does not attribute omnipotence to management,³¹ and recognises that at least some minimal consequential nexus must exist, before any given condition can be said to have arisen “out of or in the course of” management action. The legal approach recognises that, at some point, psychiatric or psychological injuries occurring at work – and even if tangentially connected to reasonable management action - can sometimes no longer be realistically attributed to reasonable management action. Here, of course, the applicable legal notions are those of proximity/remoteness³².

³⁰ One significant change is that there is not the same need for any of the matters raised in s.32(5) to be “a significant factor”.

³¹ Consider here *Bowers v WorkCover Queensland* [2002] QIC 18; 170 QGIG 1 “reasonable systems reasonably implemented can miscarry”.

³² There is an on-going debate in tort law as to whether proximity has out-served its usefulness. Consider *Hill v Van Erp* (1997) 71 ALJR 487; *Esanda Finance Corporation v Peat Marwick Hungerfords* (1997) 71 ALJR 448. This is however a different issue to the analysis of a specific industrial law provision that contains a formula of words that makes proximity a central issue.

[42] There are two cases, in particular, that usefully demonstrate this concept. One that demonstrates how an indirect result is still not too remote from management action; and another that demonstrates how matters can end up beyond the realm of tangible attribution to management action. The cases to which I refer are: *WorkCover Queensland v Curragh Mining Pty Ltd*³³ and *RACQ Operations Pty Ltd v Q-COMP*³⁴.

[43] In *WorkCover Queensland v Curragh Mining Pty Ltd*³⁵, the worker (a Mr Burgess) had been continuously employed by the same employer as a purchasing clerk for in excess of 16 years. During the period 1987 – 2000 Mr Burgess was required to occupy a more senior position as a purchasing officer, and he performed this higher role to the entire satisfaction of his employer. Then, in about May 2000, Mr Burgess was promoted to an even more senior position, that of contracts officer. The evidence was that the claimant was a diligent and conscientious employee, and that he perceived the contracts department to be in a mess at the time when he took it over. Simultaneous with his appointment as contracts officer, Mr Burgess' employer expanded the role of that department. Because of all this, Mr Burgess became more and more anxious, and he took it upon himself to perform a steadily increasing workload, until he reached a point at which he was regularly working 12 – 16 hours, per day. Eventually, Mr Burgess de-compensated, with a psychological disorder.

[44] The claimant's *Application for Compensation* arising from these facts was accepted by WorkCover Queensland, yet this was subsequently contested via an *Application for Review* lodged by the employer. The Statutory Review Unit upheld the original decision by WorkCover Queensland to accept the claim. An appeal was then commenced by the employer before the Industrial Magistrates Court. That appeal was successful.

[45] Although satisfied that the worker had sustained an injury within s.34(1), the Industrial Magistrate was further satisfied that the worker's condition was attributable to the employer's decision to promote Mr Burgess, whilst simultaneously expanding the role of their contracts office. This was still held to be reasonable management action.

[46] The matter then went on appeal to the Industrial Court. At that time it was principally contended by the appellant that the Industrial Magistrate had fallen into error for having misconstrued the medical evidence, which had been to the effect that it was not the changes brought about by management that had caused Mr Burgess to decompensate, but rather Mr Burgess had suffered an injury as a result of the reaction caused by his own realisation of his inability to cope, which developed in the aftermath of those changes. That argument was quickly rejected by President Hall, for the same reasons expressed by him in *Avis v WorkCover Queensland*³⁶. In so doing, President Hall also said, in part

[A] psychological disorder following in the wake of reasonable management action, including turbulence in the workplace flowing from reasonably taken changes, is withdrawn from the definition of injury by the phrase "arising out of"...

[47] *Curragh Mining* serves (I think) to demonstrate (*inter alia*), that the after-effects of management decision making (if these be, as was the case here, the nominated stressor), can still be included within the rubric of 'management action', no matter that these after-effects may be several steps removed from, and no longer proximate in time with, the initiating instance of management action. All that is required is that the after-effects still be sufficiently traceable to the original management action, that it can be said that the required nexus between the stressor, and the nominated instance of management action still exists. This is an important consideration to bear in mind, particularly in those cases where the alleged stressors are very broadly conceived: such as happens when the stressors are said to be the system of work; or are excessive work loads; or are the fact of "general chaos" in the workplace. All of these things can conceivably sustain an *Application for Compensation*, but will not, if there is some acceptable connection with RMA.

[48] *RACQ Operations Pty Ltd v Q-COMP*³⁷, serves to demonstrate an instance at the other end of the spectrum, that being an instance in which it becomes artificial to allege that the stressor is caused by RMA, due to the stressor being too far removed from the management action that it is said to be a consequence of.

³³ *The facts in Avis v WorkCover Queensland afford another, equally good, example.*

³⁴ [2003] QIC 162; 174 QGIG 824

³⁵ C89 of 2002.

³⁶ [2000] QIC 67; (2000) 165 QGIG 788

³⁷ *Supra.*

[49] In *RACQ Operations*, the claimant (a Mr Barnes) was a RACQ Patrol Officer. Mr Barnes made an *Application for Compensation* in February 2002 with respect a condition which he described as “stress/anxiety”, caused by work. That claim was accepted by WorkCover Queensland. The employer than made an *Application for Review* of that decision, and the original decision to accept the claim was then confirmed by the Review Unit, whereupon the employer appealed the matter, to the Industrial Magistrates Court.

[50] The evidence at trial had been that Mr Barnes’ stressors had been a number of discrete incidents, at work. One of these had been an instance in which the Claimant had been required to rescue a child locked in a car in somewhat traumatic circumstances. Another had been an instance when Mr Barnes narrowly escaped being struck by a passing vehicle whilst attending to a roadside breakdown; and yet another had involved an instance where Mr Barnes had very nearly been savaged by a dog, when attending at an address in response to a call for mechanical assistance.

[51] The Industrial Magistrate was satisfied that Mr Barnes had been caused to suffer an aggravation of an underlying psychological disorder and that the aggravation was caused by the aforementioned incidents, such that work was “a significant contributing factor” to that injury. The Industrial Magistrate was further satisfied that s.34(5) did *not* apply in this instance.

[52] At trial (and during the subsequent Industrial Court appeal), counsel for the employer had contended that the “reasonable management action” was the employer’s overall system of work, whereby jobs were dispatched to individual Patrol Officers, who would then respond to those jobs, in accordance with the requirements of a detailed procedures manual. Because the manual gave the individual Patrol Officers significant discretion *not* to performs jobs wherever their own safety was perceived to be at risk, the appellat employer argued that the employer had done all that could be expected of any reasonable employer in these circumstances; such that the claim was one that was properly governed by s.34(5)(a). However, that argument was rejected, both in the Industrial Magistrates Court, and by President Hall, on the basis that this conferral of substantial operational discretion disproved the very argument that it had been advanced in support of: as it severed any connection between management instructions and the happening of the stress-inducing events.

[53] In the appeal decision, President Hall put it this way

Before the Industrial Magistrate and, indeed, on the appeal, the contention of counsel for the appellant was that the “reasonable management action taken in a reasonable way by the employer in connection with the worker’s employment” for the purposes of s. 34(5)(a) was the employer’s system of work, constituted by the giving of directions about sites to be attended, and the provision of a detailed workplace health and safety manual detailing how specific incidents were to be dealt with./

...[T]he rejoinder, and it seems to me to have been correct, was that the judgements required of Patrol Officers and the discretions reposed in Patrol Officers by the Manual are so substantial as to render the preparation/circulation of the Manual and the giving of directions about vehicle location too remote from the injury to allow one to characterise the injury as “arising out of reasonable management action taken in a reasonable way by the employer”. Without that minimal causal nexus, s. 34(5)(a) cannot apply, compare *WorkCover Queensland v. Curragh Mining Pty Ltd*: (2003) 172 QGIG 6 at 7./

I can understand that s34(5)(a) might be attracted if a team of workers operating under a similar workplace health and safety manual attended at a site whereat the foreman made the judgments and exercised the discretions, but in this case all “management action” was spent before the transaction giving rise to the alleged injury. Having regard to the passages emphasised in the extract taken from the Industrial Magistrate’s decision, it seems to me to be tolerably clear that the Industrial Magistrate accepted the submissions of counsel for the respondent upon the matters of remoteness/causation.”

[54] From these passages further succinct guidance can be derived, and added to those which I have already identified. That guidance, I think, can be summarised as:

For RMA to apply, the injury must not be so remote from the fact of management action as to lose all ability to be characterised as an artefact of management action.

What is Management Action?

[55] The foregoing analysis has an attendant, parallel aspect. In order to draw the required nexus between the putative psychiatric/psychological illness and reasonable management action, one must also be able to identify instances of “management action”, in order to next assess whether these have been reasonable, and taken in a reasonable way.

[56] This is an exercise that needs to be undertaken once the particular causes for the medical condition that has given rise to an *Application for Compensation* have been identified. At that stage the identified stressors must be assayed, in order to see whether these amount to instances of management action. If that inquiry is initially answered in the negative, then s.32(5) has no application.³⁸ If, on the other hand, the answer to that inquiry is in the affirmative, then the line of inquiry must continue, in order to ascertain whether that management action has been both reasonable, and taken in a reasonable way, in connection with the claimant’s employment.

[57] The sub-expression *management action* as is used in ‘reasonable management action - is nowhere defined in the Act. It should be given its ordinary or natural meaning. It also bears observing that the courts have demonstrated a preparedness to construe the concept fairly expansively³⁹.

[58] The Fourth Edition of the *Macquarie Dictionary* (2005) says that the noun ‘management’ means “the act or manner of managing, handling, direction or control”. Meanwhile, the noun ‘action’ (as in ‘management action’) is capable of a number of meanings, including: “an exertion of power or force”; “habitual acts; conduct”, and “something done; an act; deed”. All of these words invoke a meaning whereby the outcome/result is something that can be attributed to some specific conduct or decision by management.

[59] Perhaps the best guidance that I have been able to find as to the meaning that should be afforded to the expression ‘management action’ relates to the legal meaning given to the adjective ‘managerial’, as was afforded in *Re Canadian General Electric Company Limited v Ontario Labour Relations Board* (1956) OR 437. In that case it was stated:

.....managerial in the *Labour Relations Act* means something pertaining to or characteristic of a manager and... the word “manager” means one who manages....manage includes the action or manner of conducting affairs or administering and directing or controlling any matter ... the essential meaning of the word is to control and direct and that must include not only administration but direction of planning for any particular enterprise....

What then is Reasonable Management Action?

[60] Subsection 32(5)(a) speaks of *reasonable* management action taken in a reasonable way by an employer in connection with the worker’s employment. Subsection 35(5)(b) further speaks of reasonable management action.

[61] The word ‘reasonable’ wherever used in legislation is a lawyer’s signpost to the need to apply an objective test for the existence of whatever noun the adjective ‘reasonable’ has then been welded to – ‘reasonable fitness for purpose’; ‘reasonable belief’; ‘reasonable force’; ‘reasonable mistake’; ‘reasonable management action’; and so on. This requires the application of the standards and expectations of a so-called ‘reasonable person’ – one who stands as a disinterested on-looker and seeks to assess whether the conduct in issue was reasonable, having regard to community standards and expectations as to what might be regarded as fair and proper.

³⁸ Perhaps the clearest example is that afforded by *RACQ Operations Pty Ltd v Q-COMP*, *ibid* where the identified stressors were found to be too remote from management action for there to be any connection between the claimant’s decompensation and management action.

³⁹ *Bowers v WorkCover Queensland*, which has held that s.32(5)(a) is not confined to management action taken “against” a worker - see the later discussion, at paragraph [70]

[62] It should also be remembered that there are examples of actions that “may” be reasonable management action, afforded in s.32. Section 14D of the *Acts Interpretation Act 1954* specifies the use to which examples may be put, wherever these are included in a legislative provision to demonstrate its operation. Section 14D provides that specified examples are not to be taken as an exhaustive list; and should not be taken to limit the scope of the provision. Indeed, s.14D specifies that examples may serve to extend the meaning of the provision. Finally, s.14D specifies that any examples that are set out in the provision should be “read in the context of each other and the other provisions of the Act”, yet that if the examples are inconsistent with the provision, the words of the provision are to prevail.

[63] It is noteworthy that each of the examples given at the base of s.32 relate to things done/not done or decisions made in relation to the worker. However, the decided cases clearly indicate that management action includes broader realms of action, beyond those specifically related to the injured worker. The decision in *Avis v WorkCover Queensland*⁴⁰ by Education Queensland to introduce a new student behaviour management policy affords one clear example.

[64] The decided cases also indicate that reasonable management action must be considered and assessed “in all the circumstances” of the case under examination, and that these circumstances are taken to include any specific awareness that management may have about any pre-existing psychological or psychiatric condition, or risk of decompensation that the claimant may have⁴¹.

[65] In *WorkCover Queensland v Kehl*,⁴² the claimant was a school teacher, and the stressors were found to be threefold: the manner in which Education Queensland had dealt with two complaints made to the department by the mother of one of the students in one of her classes; and the manner in which Education Queensland had dealt with a grievance that the claimant had lodged against the principal of the school in which she worked.

[66] On 6 December 2000 the claimant claimed workers’ compensation for an injury described as a “major depressive disorder”. WorkCover Queensland initially rejected that claim. The Statutory Review Unit subsequently confirmed that decision. The claimant then appealed to the Industrial Magistrates Court, and she was successful. The Industrial Magistrate found that the respondent was suffering from a previous medical condition for which she was being treated by her general practitioner and for which she was taking a common anti-depressant drug (aropax), and that her previous condition had been aggravated by the incidents described above which arose during the course of her employment. In the circumstances, the Industrial Magistrate found that the respondent suffered an “injury” within s. 34(3)(b)(iii) of the *WorkCover Queensland Act 1996* in that there had been an aggravation of a previous medical condition which arose out of her employment, and in that her employment had been a significant contributing factor to that aggravation. The Industrial Magistrate further found that the injury was not one that was excluded by s.34(5).

[67] In this regard, the Industrial Magistrate found that the decisions and actions taken by Education Queensland with respect each of the three matters were instances of ‘management action’ and that it was reasonable for Education Queensland to have become involved in each matter. However, the Industrial Magistrate went on to find that Education Queensland did not manage the transactions in a reasonable way. His Worship came to that conclusion by stating

In light of the management’s special knowledge of Kehl’s personal disability [ie: the pre-existing depressive illness], the taking of reasonable management action involving Kehl will only be taken reasonably if it takes Kehl’s particular propensities into account.

⁴⁰ *Supra*.

⁴¹ *This was not the case prior to 1 July 1999.*

⁴² [2002] QJC 23; 170 QGIG 93.

[68] This decision was taken on appeal to the Industrial Court, yet the appeal was ultimately unsuccessful. On the appeal it was contended that the Industrial Magistrate had erred in law for having had regard to the respondent's susceptibility to stress induced by her employer. President Hall rejected that submission, noting that this case was *not* analogous to *Ivey v WorkCover Queensland*, by reason that, at the time that *Ivey* had been decided, s.34(5)(b) expressly provided that in deciding in a particular case whether the management action was reasonable or whether the management action was taken in a reasonable way, regard might not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.⁴³ Yet, that requirement was removed by the 1 July 1999 amendments to the 1996 Act. President Hall then went on to say

With the repeal of the previous s.s.(5) there seems to be no reason why "reasonable" in s. 34(5)(a) should not be treated as meaning "reasonable in all the circumstances of the case".....there seems to be no reason for concluding that the circumstances of the case do not include circumstances relating to the psychological makeup of the worker where those circumstances are known to the employer. It is not a matter of suggesting that management should speculate about the psychology of each of its workers if they are engaging in management action which may impact upon particular workers, or should require psychological evaluation of its workers. It is simply a matter of recognising that fixed with knowledge of a worker's makeup a reasonable person would take that knowledge into account in assessing what is a reasonable way in which to implement an otherwise reasonable decision.

[the emphasis is not in the original, and has been included by me]

[69] Reasonable management action also need only be reasonable, not perfect. Even in reasonable workplaces mistakes are often made. In *Bowers v WorkCover Queensland*⁴⁴ the appellant had developed a depressive illness which she attributed to a difficult relationship with her immediate supervisor, and to her immediate supervisor's treatment of her. Bowers further alleged that she had been entrusted with an unduly burdensome volume of work, and had received inadequate training, in preparation. Her *Application for Compensation* was not accepted by WorkCover Queensland, and that rejection was subsequently upheld by the Review Unit. When the matter was taken on appeal before the Industrial Magistrates Court, the appeal was also dismissed, on the basis that the appellant's injury had arisen out of RMA. The decision was then taken on appeal to the Industrial Court, where the appeal was again dismissed. In giving judgement, President Hall said, in part

There is nothing in s.34(5)(a) and there is nothing in the extrinsic materials (reviewed in *Priddle v WorkCover Queensland* (1999) 162 QGIG 170), to indicate that paragraph (a) is confined to the impact of disciplinary action. Neither, given the use of the word "against" at paragraph (b), can there be any reason for limiting paragraph (a) to action taken against the worker, e.g. a transfer for other than disciplinary reasons. Neither am I able to accept the submission for the appellant that where the work environment is found to be a significant cause of a depressive illness, the employer's system of work and its implementation cannot be found to be reasonable. The circumstance that a system of work or its implementation has miscarried does not necessarily lead to the conclusion that either the system of work or its implementation was unreasonable. Reasonable schemes reasonably implemented can miscarry. Further, on the appellant's approach to the adjective "reasonable" it is difficult to think of an example of a psychiatric or psychological injury otherwise within s.34(1) being withdrawn from s.34(1) by s.34(5)(a)...../

....Q-COMP freely acknowledges that this is not a case in which the conduct of the appellant's immediate supervisor and the employer's systems of work were without blemish. The Industrial Magistrate was plainly aware of the blemishes....

[the emphasis is not in the original, and has been included by me]

⁴³ If *Ivey* had arisen for decision on the post 1-July 1999 version of the 1996 Act (or on the current s.32) it is probable that the result in it would have been the opposite.

⁴⁴ [2002] QIC 18; 170 QGIG 1

[70] However, reasonable management action cases very often do involve the taking of management action against the claimant. In those instances, “reasonable in all the circumstances of the case” must be taken to include some consideration of the manner of delivery of that management action. In *WorkCover Queensland v Heit*,⁴⁵ President Hall said

With the benefit of hindsight, the question whether the action taken by Ms James on the various occasions was reasonable management action displaced from the prominence which the should otherwise have had, the issues relating to Ms James’s language, tone of voice and demeanour. All of those matters were of course relevant to whether the action was “taken in a reasonable way”.

[71] I conclude this section merely by giving an example of reasonable management action, together with an example of unreasonable management action. These serve to demonstrate that, when taking management action against a worker, the content requirements for RMA closely parallel those for administrative law natural justice:

- The decision to suspend a bookkeeper on full pay whilst conducting an investigation into accounting irregularities (subsequently found to be baseless) was held to be reasonable management action: *WorkCover Queensland v Tomasich*⁴⁶.
- A decision to communicate a decision to transfer a police officer from his position in charge of the Police Unit at ‘Crimestoppers’, coupled with the actual transfer because the (Civilian) Board at CrimeStoppers were concerned that he had “lost motivation and was bad for morale” was held to be unreasonable management action – given that the claimant had not been given any particulars of those complaints, nor any opportunity to respond to them, before the decision to transfer him had been made: *WorkCover Queensland v Markwell*⁴⁷.

⁴⁵ [2000] QJC 22; 164 QGIG 121

⁴⁶ [2002] QJC 42; 170 QGIG 464

⁴⁷ [2001] QJC 9; 166 QGIG 351

The Recent Cases

Claims of Mixed Aetiology

[72] Very often, psychiatric or psychological illness claims are presented and the *Application for Compensation* nominates (or the subsequent factual investigation reveals) a whole series of stressors that are alleged to have given rise⁴⁸ to the claimant's condition. Some of these may be instances of RMA, yet some of the other stressors might have nothing to do with s.32(5). The question then arises: is such a claim capable of acceptance?

[73] Until very recently, that question was often approached in the affirmative, on the basis of a broad understanding that the legislation was intended to be beneficial. Further comfort was arguably provided for that view by the decision of President Hall in *Delaney v Q-COMP Review Unit*⁴⁹.

[74] In *Delaney*, the claimant had been employed as a psychiatric nurse within the Integrated Mental Health Unit at the Bundaberg Base Hospital. He suffered a myocardial infarction⁵⁰ in early June 2002, and ceased work. On 21 June 2002, Mr Delaney made an *Application for Compensation*, in which he claimed to have also suffered from an adjustment disorder, relating to work stress, arising over a period of time, since about February 2000.

[75] That *Application for Compensation* was initially rejected by WorkCover Queensland. That decision was later confirmed by the Review Unit, on the basis that the condition was one governed by s.34(5). An appeal was then commenced by Mr Delaney before an Acting Industrial Magistrate at Bundaberg, and that appeal was also decided unfavorably to Mr Delaney; whereupon an appeal was commenced in the Industrial Court.

[76] During the Industrial Court appeal, it was noted that the case below was one that had been argued on the basis that there had been multiple stressors, giving rise to Mr Delaney's adjustment disorder.⁵¹ Some of these were found to be instances that could not on any assessment be categorised as management action;⁵² and others were assessed to be instances of poor management action, yet not to unreasonable management action, as they were assessed as "mere blemishes" of the type described in *Bowers v WorkCover Queensland*.⁵³ Still other stressors were found by the Acting Industrial Magistrate to be instances of unreasonable management action, yet these stressors were then also found to be ones that had no nexus with the injury - at least on the Acting Industrial Magistrate's interpretation of the medical evidence. On this basis the Acting Industrial Magistrate upheld the decision to reject the *Application for Compensation*.

[77] However, in giving the Industrial Court appeal decision, in favour of the appellant worker, President Hall noted that the Acting Industrial Magistrate had been mistaken in his understanding of the medical evidence – such that at least some instances of unreasonable management action that were said to have no nexus with the onset of the adjustment disorder *did*, in fact, have a nexus with the injury. Even more significantly, the President noted that, on the facts of the case, each of the nominated stressors were strongly linked, by subject matter, time, and personality, in a discordant workplace in which, to the knowledge of management, Mr Delaney had decompensated once before, also as the result of workplace stress.

[78] Because of the inter-linkages between the supposedly discrete stressors, President Hall felt that the claimant was properly entitled to a much more "global" evaluation of the actions in which the management team at the hospital had engaged. Accordingly, many minor blemishes, which, if considered in isolation might amount to reasonable management action, ultimately amounted if viewed collectively to a systemic failure by management, and hence were unreasonable management action. On this basis the appeal was allowed, and Mr Delaney's *Application for Compensation* was accepted.

⁴⁸ More properly stated, are each alleged to be "a significant contributing factor" towards...

⁴⁹ [2005] QIC 11; 178 QGIG 197. My own view, explained further below, is that Delaney has never provided any support for this approach, as it deals with a different issue.

⁵⁰ The heart attack, itself, was never at any stage relied upon by Mr Delaney as a basis for his *Application for Compensation*.

⁵¹ Seven stressors in total were nominated

⁵² For example, a letter sent by nursing union members expressing no confidence in their own delegates at the Bundaberg Integrated Mental Health Unit.

⁵³ *Supra*.

[79] In the aftermath of *Delaney*, it at least appeared⁵⁴ to still be the case that claims could be accepted if there was at least one stressor outside the remit of the RMA exclusion; or, alternatively the claim could be accepted if, when applying a “global” view, management action appeared so thoroughly tainted by imperfection (“blemishes”: *Cf Bowers v WorkCover Queensland*) as to be better categorised as unreasonable, rather than reasonable, management action.

[80] However, the more recent Industrial Court decision in *State of Queensland v Q-COMP*⁵⁵ (the *McArthur* decision) appears to have now shut the door completely on the very idea that a mixed aetiology claim could ever be accepted.

[81] In *McArthur*, the claimant was a school teacher. On 25 June 2003 a female student made a complaint about him, alleging inappropriate physical contact. The Ethical Standards Unit within Education Queensland became immediately involved. Mr McArthur was informed of the complaint on 26 June 2003. The complainant, together with a number of witnesses, were then interviewed on 26 and 27 June 2003; and on Friday, 27 June 2003, at the end of his own record of interview, Mr McArthur was told orally that the investigation had been resolved in his favour. A written confirmation of that finding did not however make its way into his hands until the following November 2003. A two week school vacation period commenced the same afternoon as Mr McArthur had been interviewed by the investigators.

[82] Upon returning to work after that two week vacation period, Mr McArthur continued working for about a further two weeks, yet then decompensated. What had happened was that over the preceding four week period, Mr McArthur began ruminating about the allegations, and the broader consequences for him thereafter remaining at the same school as the three female students whom had been interviewed during this investigation. This caused Mr McArthur to succumb to symptoms of anxiety, loss of confidence, and depression. These symptoms were of sufficient magnitude to amount to a diagnosable psychiatric condition.

[83] Mr McArthur then lodged an *Application for Compensation*. This was rejected by WorkCover Queensland, on the basis of the view that Education Queensland had engaged in RMA during the conduct of the investigation.

[84] An *Application for Review* was then lodged with Q-COMP, and the Review Unit reversed the original decision and allowed the claim. The basis for that reversal was that there was fairly strong medical evidence that Mr McArthur had decompensated as the result of the allegations themselves (something beyond management action), rather than the subsequent investigation of those complaints. The employer, Education Queensland, then appealed the matter to the Industrial Magistrate, at Brisbane. That appeal was allowed, and the original decision by WorkCover Queensland, to reject the claim, was reinstated.

[85] The Industrial Magistrate found that the relevant management action for purposes of s.34(5)(a) began with the taking of the student complaint on 25 June 2003, and did not cease until the delivery of the written conclusion of the investigators to Mr McArthur, in November 2003. This was found to be reasonable management action, taken in a reasonable way. In part, the Industrial Magistrate said:

In the history of this claim much attention has focused on whether the psychological disorder arose as a result of the allegations themselves or as a result of the investigative process. Having seen and heard Mr McArthur in the witness box and considered all the medical evidence I accept the opinion of the psychiatrist, Dr Richardson, that it was the former which was the major contributing factor to the onset of the psychological disorder (penultimate paragraph exhibit 5). However he did concede in cross-examination, and I agree, that the investigation was a significant contributor (T56).....

However, on the balance of probabilities I am not satisfied that there was a sufficient causal relationship in Mr McArthur’s case to be able to say that the disorder ‘arose out of’ the reasonable management action. It was a lesser significant contributor to the disorder amongst several stressors.

⁵⁴ Perhaps more pointedly, *Delaney* did not specifically refute an idea that had gained currency, in some quarters, that a claim touched by RMA could still be accepted, if there was some other significant stressor, outside s.32(5).

⁵⁵ [2005] QJC 46; 179 QGIG 491.

[86] From that decision Q-COMP then appealed to the Industrial Court. The Appellant argued that s.34 required a “composite” consideration of the operations of subsections (1) and (5), and not, as the Industrial Magistrate found, a satisfaction in the first instance of the requirements of s.34(1) and then a consideration whether the injury was one for exclusion under s.34(5). It was argued that to do otherwise would produce unfair results for workers, who could not be compensated for an injury caused by significant exposure to a work-related stressor if there were another stressor related to management action. Meanwhile, the Respondent filed a notice of contention, submitting that, having made a finding of fact that the investigative process was “a” significant contributor to the psychiatric disorder, though of lesser significance than other contributors, the causal test posited by “arising out of” was met.

[87] President Hall agreed in essence with the Respondent’s notice of contention, but noted that whether management action was “a significant” factor, (or not), was simply not to the point, as all that was required was for the psychiatric or psychological condition to “arise out of, or in the course of” reasonable management action, taken in a reasonable way. The President further held that a purposive approach to statutory interpretation must be adopted, and that the true purpose of s.34(5) could be gleaned from the Explanatory Note to the (1996) Bill, when s.34 was first introduced.⁵⁶ President Hall then went on to note that s.34(5) commences by use of the word “despite”, and that the High Court⁵⁷ has said that this word is a synonym for “notwithstanding”. He then went on to say

It is not the concern of s.34(5) to nominate stressors which may be taken into account in determining whether a particular psychiatric or psychological disorder falls within the rubric of s.34(1). The concern of s.34(5) is to remove certain psychiatric and psychological disorders from the statutory definition of “injury”. Where a situation arises in which s.34(1) “ropes-in” a particular psychiatric or psychological disorder and s.34(5) excludes the same psychiatric or psychological disorder, there is an inconsistency which because of the use of “notwithstanding” must be resolved by allowing s.34(5) to prevail.

For these reasons, it seems to me that the decision of the Industrial Magistrate was entirely correct.

[88] There has been one further Industrial Court case post-McArthur in which these issues have been ventilated. That case was *Prizeman v Q-COMP*⁵⁸.

[89] Merle Prizeman had been a long term employee of Coles Myer Ltd, who is a self-insurer. She made an *Application for Compensation* in relation to a psychological injury arising out of a number of nominated stressors at work, principally involving Ms Prizeman’s interactions with one of her supervisors, a Ms Sturgess, the store manager. That application was rejected on the basis of the self-insurer contending that Ms Prizeman’s condition was one that was withdrawn from the definition of injury, by reason of s.34(5)(a) of the 1996 Act. The Review Unit then confirmed that decision. An appeal was then commenced by Ms Prizeman before the Industrial Magistrates Court.

⁵⁶ see paragraph [17], above

⁵⁷ See: *Attorney General of the Commonwealth v Oates (1999) 198 CLR 162 at paragraph [33]*.

⁵⁸ [2005] QIC 53; 180 QGIG 481.

[90] During the Industrial Magistrates Court appeal, the stressors giving rise to Ms Prizeman's condition were identified to be:

- a) the so-called "black dress" matter;
- b) an initial staff meeting called by Ms Sturgess, in which she advised the staff, *inter alia* that their jobs were on the line;
- c) a one-on-one meeting between Ms Prizeman and Ms Sturgess in which some matters were discussed, including a \$40.00 cash discrepancy;
- d) what was called the "red basket" incident, wherein Ms Prizeman had been chided by Ms Sturgess in front of customers and other staff;
- e) Ms Sturgess chastising Ms Prizeman about a spillage on the floor (from a leaking refrigerator) on the same date as (D), also in front of other staff;
- f) claims by Ms Prizeman that Ms Sturgess called her into her office on the day that Ms Prizeman was scheduled to commence recreational leave, in order to ask Ms Prizeman whether she really wanted her job or not.

[91] At the end, matters (A) & (B) were not proceeded with. Matter (C) was a significant one that was considered at length, both in the trial and the judgement at first instance. Ms Prizeman had perceived that she had been unfairly accused of stealing. Ultimately, the Industrial Magistrate concluded that this incident amounted to RMA.

[92] Incidents (D) & (E) were also categorised as instances justifying management action, but the question then became whether Ms Sturgess had undertaken that RMA in a reasonable manner. The Industrial Magistrate was critical of the way in which Ms Sturgess had conducted herself on these occasions and felt that these were lapses from proper or reasonable treatment of staff. Ultimately however these instances were regarded as "blemishes" as "neither incident was of long duration" and because it was "difficult to assess the actual effect that same had on the appellant, based on the comparatively brief evidence provided to the court in relation to both incidents". Transaction (F) was also a matter of major significance. Although the Industrial Magistrate had earlier stated that, on matters of credit, he preferred the evidence of the injured worker over that of Ms Sturgess, the Industrial Magistrate found allegation (F) was not proved by the appellant as, "in the absence of some corroboration of the claim, I find that I cannot be satisfied that the appellant was spoken to when and in the manner alleged".

[93] The result at first instance was taken on appeal before President Hall, who felt the Industrial Magistrate's application of legal principle to be unnecessary for correction.

[94] Although the trial before the Industrial Magistrate in *Prizeman* had taken place prior to the Industrial Court's decision in *McArthur*, an appeal is to be determined on the basis of the law as it stands at the time when an appeal is determined.⁵⁹ By the time the matter came before the Industrial Court, President Hall had delivered his judgement in the matter of *McArthur*. President Hall noted that had that decision been available as an authority to guide the Industrial Magistrate in *Prizeman* at the time, then it would have been determinative of the case. President Hall put the matter this way

With hindsight, the Industrial Magistrate's inability to make findings about what was said and done at the pre-recreation leave meeting [stressor F] is decisive.....the Industrial Magistrate's inability to make a finding about what was said in the course of the meeting makes it impossible to class the transaction as other than "reasonable management action reasonably taken" and on the test posited in *Q-COMP v Education Queensland*,...that was sufficient to remove the psychiatric/psychological disorder from the definition of "injury".

⁵⁹*Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73, at 107 per Dixon J.*

Can McArthur or Prizeman be reconciled with Delaney?

[95] *Education Queensland v Q-COMP* holds that even if there is another significant (or even dominating) factor resulting in a psychiatric or psychological injury – that is, something which is other than RMA – the claim still has to be rejected, if RMA is one other factor (significant or not), in the emergence of the injury.

[96] The result in *Prizeman* then underscores the result in *McArthur*: essentially stating that it is the appellant alleging unreasonable management action, who has the persuasive onus to prove that contention; and that the nominated instances of management action will all be presumed reasonable, until proved otherwise. In this light, if there be multiple stressors, then the failure to establish that each of them are outside s.32(5) will generally prove fatal to the claim. Obviously, *Prizeman* also serves as a salient reminder about who it is who must bear the onus of proof.

[97] But where does all this sit with *Delaney v Q-COMP*⁶⁰ which speaks of the possibility of taking a “global” approach – such that isolated or minor instances of RMA can be ‘glossed over’ or ‘reclassified’ as unreasonable management action? Are not these two approaches polar opposites of each other?

[98] Although others may disagree, in my opinion, *Education Queensland v Q-COMP* has *not* widened the scope of s.32(5). Rather, the *McArthur* decision serves to illuminate the always intended meaning of the provision, since its first enactment. In this context, it needs to be remembered that the critical word - *despite* - has been part of the provision since its inception, on 1 July 1999, as part of the former s.34(5).

[99] Again, in my view, *McArthur* essentially does no more than confirm that “despite” is a synonym for “notwithstanding”, and that “despite” ought be given the same common law meaning attributed to “notwithstanding”, wherever that equivalent word is used in legislation. In that light, the only controversial aspect of *Education Queensland v Q-COMP* is that it has sounded the death knell for a practice that had developed, in some quarters, in which claims officers sometimes found a means by which to allow claims, in psychiatric/psychological injury cases with multiple stressors, by focusing on other stressors, that were outside the RMA exclusion.

[100] Here, I discern that the previous approach was likely caused by a tendency to look for an element of significance in the RMA, before holding that s.32(5) had been enlivened. Although a centrally relevant consideration when assessing ss. 32(1) and 32(3) matters, notions of significance have no role to play in s.32(5), where all that is required is some minimally causal nexus between the injury and RMA.

[101] The ‘reconciliation’ between *McArthur* and *Delaney* is, I think, to be had by conceiving the assessment required by s.32(5) as one in which there is an eventual convergence of two analytical streams. Yet, the convergence should not happen until after analysis has been completed in each separate stream: not only must there be the requisite connection between the psychiatric/psychological condition and management action (one stream); but management action must also be found to be RMA (the other stream). The *McArthur* ‘stream’ deals with the connection between the psychiatric/psychological condition and the nominated stressors, whereas *Delaney* deals in the other ‘stream’ – whether a discrete stressor is to be properly categorised as RMA.

[102] In simplest terms, *Delaney* reminds us that in some cases, particularly factually convoluted, or complex cases, the full “dynamic” between management and the worker can only be comprehended by stepping back from the action, and taking a global (“wide-angled lens”) view. *Delaney* reminds us that, in some cases, it would be artificial and thus unfair, to take a short-sighted perspective on an aspect of superficially reasonable management action, when a global viewing might reveal that discrete instance of management action in a thoroughly different, unfavourable light⁶¹.

⁶⁰ [2005] QJC 11; 178 QGIG 197

⁶¹ We are speaking here of something that is more than the “mere blemishes” of the type recognised in *Bowers v WorkCover Queensland* [2002] QJC 18; 170 QGIG 1

[103] The approach identified in *Delaney* is not required in all cases. Indeed, this approach should – if used properly - only be used where it is not meaningful to look at stressors discretely. Use of the *Delaney* approach – which in some respects might be conceived as a logical step beyond *Bowers* “blemish analysis” - results in a single assessment being made of the totality of management action, as either reasonable or unreasonable. This singular assessment does not happen under the *McArthur* approach. In the great majority of cases, the nominated stressors can (and should) still be disaggregated, and then analysed individually, even if a tranche of them still needs to be assessed globally. In those cases, a situation can arise where some stressors qualify as RMA and others do not; or where there is not enough evidence to be satisfied on the balance of probabilities that one or more stressors is *not* RMA. In those cases, *McArthur* and *Prizeman* become the determinant authorities, and the result must inevitably be that the *Application for Compensation* is one for rejection.

[104] So, in conclusion, what must be established in order for a psychiatric or psychological claim to be deemed capable of acceptance?

[105] To my mind, there are now only three navigational approaches through s.32(5):

- 1) The claimant must present a claim where none of the stressors have anything to do with RMA, or at least have no proximity to RMA (consider *RACQ Operations Pty Ltd*); or
- 2) The claimant must demonstrate that those stressors that are instances of RMA are nonetheless part of a broader pattern of unreasonable treatment, thereby ‘explaining away’ any superficially reasonable management action that could influence the claim; or
- 3) The claimant must be prepared to take the boom net ‘full ahead’ – and successfully prove a case whereby each of the instances of management action that have resulted in the claimant’s condition are so unreasonable as to not qualify as RMA.